ORIGINAL

FILED

05 FEB 22 PM 3:07

VANCE S. WILSON
CLERK

BY _____ DEPUTY

GORDON H. DEPAOLI
Nevada State Bar 00195
DALE E. FERGUSON
Nevada State Bar 04986
WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Post Office Box 2311
Reno, Nevada 89511
Telephone: 775/688-3000

Attorneys for Defendant
WALKER RIVER IRRIGATION DISTRICT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	In Equity No. C-125-ECR Subfile Nos. C-125-B and C-125-C **WALKER RIVER IRRIGATION DISTRICT'S REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF MEDIATING PARTIES TO CONTINUE STAY OF LITIGATION**

I. INTRODUCTION

The Landolts oppose the continuation of the ongoing mediation and any stay of litigation pending that mediation. See, *Landolt Opposition to Extension of Mediation Process and Litigation Stay* dated February 7, 2005 (the "Landolt Opposition"). The Circle Bar N Ranch and others ask that the mediation be expanded to include all defendants or, if not so expanded, be discontinued. *Response to Joint Motion of Mediating Parties to Continue Stay of Litigation In C-125-B and C-125-C Subproceedings* dated February 7, 2005, at 2-4 (the "Circle

456

Bar N Response"). However, the Circle Bar N Response recognizes that regardless of whether the mediation process continues, the litigation should be stayed until all parties are properly served. That is already the case because of the provisions of this Court's April 19, 2000, Case Management Order in Subfile C-125-B and its January 24, 1995, Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County in Subfile C-125-C.

The Landolt Opposition is based upon a fundamental misunderstanding of the nature of the litigation. The Landolt Opposition and the Circle Bar N Response misrepresent the origin of the ongoing mediation and its objectives.[1] The United States, the Walker River Paiute Tribe and others have jointly filed a Reply in Support of Motion of Mediating Parties to Continue Stay of Litigation. The Walker River Irrigation District (the "District") joins in that response.

II. THE MEDIATION

A. Origins of the Mediation.

In the fall of 2001, the District joined with Nevada, California, the Walker River Paiute Tribe, Mono County, California, Lyon County, Nevada, Mineral County, Nevada, and the Walker Lake Working Group in requesting that the United States, through the Department of Justice and the Department of the Interior, assemble a team to represent the interests of the Untied States in negotiations with them with respect to issues on the Walker River system. While waiting for a response from the United States, those parties interviewed candidates to act as a mediator and, subject to approval by the United States, selected a mediator.

---

[1] Counsel for the District was not served with either the Circle Bar N Response or the Landolt Opposition. District Counsel was served with the Circle Bar N and Landolt pleadings in November, 2004. However, as is apparent from the Certificate of Service attached to the Circle Bar N Response and from the Proof of Service regarding the Landolt Opposition, counsel for the District is not on either list. However, copies of the Oppositions were sent to the District Manager.

In May, 2002, the United States appointed a team to represent its interests. Thereafter, the Mediation Process Agreement was negotiated. The Mediation Process Agreement was executed by the Mediating Parties in late April and early May, 2003. All of this occurred without direction or order from this Court under Local Rule 16-5 or the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§651 et seq.

B. The Role of the Court.

Section 9.1 of the Mediation Process Agreement provided that it could not become effective until the Court entered an order "substantially in accordance with the attached Proposed Order Governing Mediation Process." The Proposed Order had two key purposes. The first was to ensure that the communications in the process would not be admissible or discoverable in the litigation, except as expressly allowed by the Mediation Process Agreement. See, *Order Governing Mediation Process* at para. 3, Docket No. 430; see also, 28 U.S.C. §652(d). The second was to ensure that, except as to issues related to service of process, the litigation would be stayed. Id. at para. 2.

Therefore, on May 9, 2003, the Mediating Parties filed a joint motion requesting that the Court enter the proposed *Order Governing Mediation Process*. On May 27, 2003, the *Order Governing Mediation Process* was entered, as proposed. See, C-125-B, Docket No. 430. The entry of that Order did not convert the mediation into a court sanctioned or court sponsored mediation, under Local Rule 16-5 or the Alternative Dispute Resolution Act. The Order did not direct that the mediation commence and did not make it exclusive. See Landolt Opposition at 2; 3.

In addition, contrary to the assertions of the Landolts and Circle Bar N, on December 1, 2004, this Court did not direct that the motion presently before the Court address the issue of whether or not the mediation should continue. The continuation of the mediation was left to

the Mediating Parties. The Court directed only that a motion to continue the stay of litigation be filed by a date certain. See, December 1, 2004, Transcript of Proceedings at pgs. 15-19; see also, December 1, 2004, Minute Order, Docket No. 736.

C. The Objectives of the Mediation.

The Landolt Opposition states that the object of the mediation process is to "adjudicate and reallocate the water, thus presumably to adjudicate and reallocate water property rights currently belonging to the [Landolts]" with the Landolts being allowed an opportunity only for comment after the fact. See, Landolt Opposition at pg. 8; 4. Similarly, the Circle Bar N Response suggests that the Mediating Parties intend to resolve the litigation in ways inconsistent with the rights of individual water right holders and without their input. Circle Bar N Response at pgs. 3-4. Those assertions have no basis in fact.

Certainly, when parties begin mediated discussions concerning complex litigation, there is no way to know the details of the final product of the mediation. One of the benefits of seeking a mediated, rather than litigated, outcome is that solutions not available in litigation may be considered. Paragraphs 6 and 7 of the Mediation Process Agreement recognize those facts, as well as the fact that the Mediating Parties may be able to accomplish nothing more than the establishment of a foundation on which a final settlement may be based.

From the outset, the Mediating Parties have recognized that proposals for settlement must be susceptible to implementation practically and legally within a reasonable period of time. They are well aware that no single party or combination of parties involved has the power to compromise the water rights of the hundreds of parties not directly involved in the mediation. They have not considered proposals for settlement that do nothing more than realign the parties to the litigation, such that the parties to the mediation become aligned against

those who are not, with the result that "new" litigation ensues which is every bit as complicated, controversial and lengthy as that already pending ensues.

D. The District's Public Meeting Concerning Continuing the Mediation and Continuing the Stay.

On December 15, 2004, the District held a properly noticed meeting of its Board of Directors. A copy of the agenda for that meeting is attached hereto as Exhibit A. Among the purposes of the meeting was to report concerning the mediation and its continuation, and to consider and take action on whether the District shall continue to participate in the mediation and, if so, support a continuation of the stay of the pending litigation. Exhibit A, Agenda Items 3 and 5.

Under Agenda Item 3, counsel for the District provided a report on the status of the mediation, on the Walker River Tribe's proposed framework for a comprehensive settlement, and on the responsive framework for comprehensive settlement presented by the upstream interests, i.e., the District, Lyon County, Mono County, California and Nevada. The Landolts and their counsel, Mr. Schaeffer, were present at that meeting. The assertions that the District has refused to provide information allowed by paragraph 8.3.4 of the Mediation Process Agreement is simply not accurate. See, Landolt Opposition at pg. 7.

E. The Appearance of Counsel for the District as Counsel for Persons Who Have Waived Personal Service of Process in Subfile C-125-B.

As the Court is well aware, the United States and Tribe are and for some time have been seeking waivers of personal service from water right holders within the District. Water right holders who waive personal service are also required to file and serve a *Notice of Appearance and Intent to Participate* in the litigation. They may identify an attorney in that *Notice of Appearance*. The undersigned counsel for the District has agreed to be identified and has been

identified as counsel for many of those persons with respect to the claims of the United States and the Tribe.[2]

The Landolts argue that that representation has expanded the identity of the Mediating Parties, thus further exacerbating the Court's alleged prevention of the Landolts being included.[3] The identity of the Mediating Parties has not changed. It is the District which is the Mediating Party, not its counsel. The parties to the Mediation Process Agreement, not the Court, preclude the Landolts' direct participation. However, because the District, acting through its elected directors, is a Mediating Party, the interests of all District electors, including the Landolts, are represented in the process.

III. THE LANDOLTS ARE NOT BEING DENIED ACCESS TO THE COURTS

The Landolts contend that the stay requested prevents them from "petitioning for redress of grievances." Landolt Opposition at 6. They assert that the stay allows "violations of the Decree [to] go on unabated." Id., at 11. In reality, however, under the guise of an order to show cause, the Landolts seek to litigate the underlying merits of the Tribe's claims for additional water. Although the Landolts portray themselves as the guardians of those stakeholders not involved in the mediation, they seek to litigate issues critical to the merits of the Tribe's claims before those stakeholders have been served and have had an opportunity to appear and participate.

The Landolts' desire to advance the litigation over the Tribe's claims faces an obstacle wholly independent of the stay requested here. The Case Management Order was very carefully crafted by the Court after extensive briefing by the active parties to this case. The

---

[2] The Landolts assert that such representation is a "clear conflict of interest." Landolt Opposition at pg. 4. That assertion demonstrates a lack of understanding of both the issues in that litigation and of the manner in which that litigation will proceed.

[3] As the Tribe and others point out in their joint Reply, the Landolts seek to litigate, not mediate. See, Reply of Walker River Tribe, et al. at 5-6.

Court recognized that, even before the merits of the Tribe's claims were litigated, there were numerous threshold issues which should be considered and decided. It also recognized that none of those issues should be considered until all parties were joined. All parties have not been joined, and the threshold issues have not been considered and decided. The Case Management Order prevents any litigation concerning the merits of the Tribe's claims until its provisions have been followed and satisfied.

On the other hand, there is nothing in the stay requested here or in the Case Management Order which prevents the Landolts or any other water right holder from petitioning the Court in the event that they are not receiving the water to which they are entitled under the *Walker River Decree*. The implication that there is "anarchy" on the Walker River and that the Case Management Order or the stay requested here prevents the proper administration of the *Walker River Decree* is nonsense.

IV. THE MEDIATION DOES NOT VIOLATE ANY DUE PROCESS OR EQUAL PROTECTION RIGHTS OF THE LANDOLTS OR ANYONE ELSE

The Landolts contend that they are somehow deprived of due process and equal protection by the mere existence of the ongoing mediation. With respect to the alleged due process violation, the Landolts assume a settlement which takes their water rights after a limited comment period. With respect to their equal protection claim, the Landolts again assume that the mediation without more will determine their rights and that it is the Court that prevents their participation in the mediation. They make no effort to present their claims in the context of the applicable law.

Procedural due process requires that parties who may be deprived of property be given notice and a meaningful hearing before any deprivation occurs. See e.g., *Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1983). Other than wild speculation, there is nothing to suggest that the Mediating Parties will propose a settlement which deprives the Landolts or anyone else of their

property. The District will not become a party to such a settlement. The Landolts' position also requires the assumption that if such a settlement were proposed, the Court would implement it without satisfying due process requirements. The record of the Court's insistence in this matter on due process for all water right holders belies that contention. See, Reply of the Walker River Tribe, et al., at 9-10.

As noted above, the mediation was not established or ordered by the Court and thus it is not the Court who has determined the identity of the Mediating Parties. However, even if the mediation were of the Court's making, the classifications represented by who is and who is not a Mediating Party are rationally related to a legitimate purpose. See, *Fitzgerald v. Racing Assn. of Central Iowa*, 539 U.S. 103, 107 (2003).

Exploring the potential to resolve, or at least narrow, issues in a case involving hundreds, if not thousands, of parties, and which the Court has correctly described as enormous and complex, is a legitimate purpose. Indeed, the Alternative Dispute Resolution Act of 1998 is a determination by the United States Congress of the legitimacy of that purpose.

It cannot be seriously suggested that the only mediation which is constitutionally permissible in a case like this one, is one which must include every party, each with separate representation. If that were the standard, there could be no mediation. Thus, to pursue the legitimate purpose of alternative dispute resolution here, it is necessary to limit the number of participants in some manner. In so doing, it is rational to include as participants the parties seeking, or attempting to seek, additional water. Therefore, it is reasonable to include the Walker River Tribe, the United States and Mineral County.[4] It is also rational to include those who would have an interest in ensuring that the parties seeking additional water do not in fact

---

[4] Contrary to the suggestion in the Circle Bar N Response, it is therefore not illogical to include Mineral County even though it has not been granted permission to intervene. See, Circle Bar N Response at 4.

acquire any. It is especially rational to include an entity whose electors constitute the very individuals whose water rights may be affected and whose elected directors are among those individuals. Thus, it is reasonable to include the District. It is reasonable to include the County in which the District is located, Lyon. In the absence of an entity similar to the District in California, it is reasonable to include the county in which the farms of affected water users are located, Mono County. Finally, the presence of the two states is important because of the interstate nature of the Walker River Basin and because of their broader interests in the basin.

In short, then, even if the Court had ordered the mediation and had established the limits on participation, its actions would not have violated the equal protection rights of the Landolts or anyone else.[5]

///

///

///

///

///

///

///

///

///

///

///

[5] The Landolts' reliance on *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544 (1923) is misplaced. That case stands for nothing more and nothing less than a requirement that classifications must have a rational relationship to a legitimate purpose. Any classification here meets that test.

V. CONCLUSION

The Court should continue the stay. All other aspects of the Order Governing Mediation Process remain in full force and effect even after the mediation ends. See, Order Governing Mediation Process at para. 4.

Dated this 22nd day of February, 2005.

WOODBURN AND WEDGE
6100 Neil Road, Suite 500
P.O. Box 2311
Reno, Nevada 89511

By: Gordon H. DePaoli
GORDON H. DEPAOLI
Nevada State Bar 00195
DALE E. FERGUSON
Nevada State Bar 04986
Attorneys for Defendant
WALKER RIVER IRRIGATION DISTRICT

CERTIFICATE OF MAILING

I certify that I am an employee of Woodburn and Wedge and that on this date, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing ***WALKER RIVER IRRIGATION DISTRICT'S REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF MEDIATING PARTIES TO CONTINUE STAY OF LITIGATION*** in an envelope addressed to:

Marta Adams
Deputy Nevada Attorney General
100 N. Carson St.
Carson City, NV 89701

Cheri K. Emm-Smith
Mineral County District Attorney
P.O. Box 1210
Hawthorne, NV 89415

Greg Addington
Asst. U.S. Attorney
100 W. Liberty St., #600
Reno, NV 89501

Simeon Herskovits
Western Environmental Law Center
P.O. Box 1507
Taos, NM 87571

George Benesch
190 W. Huffaker Ln., #408
Reno, NV 89511

Robert L. Hunter, Superintendent
Western Nevada Agency
Bureau of Indian Affairs
1677 Hot Springs Rd.
Carson City, NV 89706

Linda A. Bowman
Law Office of Linda A. Bowman, Ltd.
540 Hammill Ln.
Reno, NV 89511

John Kramer
Dept. of Water Resources
1416 - 9th St.
Sacramento, CA 95814

Kelly R. Chase
P.O. Box 2800
Minden, NV 89423

Timothy A. Lukas
P.O. Box 3237
Reno, NV 89505

Ross E. de Lipkau
Marshall, Hill, Cassas & de Lipkau
P.O. Box 2790
Reno, NV 89505

Erin Mahaney, Staff Counsel
Office of Chief Counsel
State Water Resources Control Board
1001 I St., 22nd Floor
Sacramento, CA 95814

Alice E. Walker, Scott McElroy
Greene, Meyer & McElroy, P.C.
1007 Pearl St., #220
Boulder, CO 80302

James Shaw
Chief Deputy Water Commissioner
U.S. Board of Water Commissioners
P.O. Box 853
Yerington, NV 89447

Jeff Parker
Deputy Attorney General
Office of the Attorney General
100 N. Carson St.
Carson City, NV 89701-4717

Stacey Simon
Deputy County Counsel
Mono County
P.O. Box 2415
Mammoth Lakes, CA 93546

David L. Negri
U.S. Dept. of Justice
161 E. Mallard Dr., Suite A
Boise, ID 83706

Stuart L. Somach
DeCuit & Somach
813 6th St., 3rd Floor
Sacramento, CA 95814-2403

Michael W. Neville
Deputy California Attorney General
455 Golden Gate Ave., #11000
San Francisco, CA 94102-3664

Garry Stone
290 S. Arlington Ave.
Reno, NV 89501

Hugh Ricci, P.E.
Division of Water Resources
State of Nevada
123 W. Nye Ln.
Carson City, NV 89710

Alan Biaggi
Dept. of Conservation & Natural Resources
State of Nevada
123 W. Nye Ln.
Carson City, NV 89706

Andrew H. Sawyer
P.O. Box 100
Sacramento, CA 95812

Walker River Irrigation District
P.O. Box 820
Yerington, NV 89447

Susan L. Schneider
Attorney for the United States of America
U.S. Dept. of Justice
Environment & Natural Resources Division
999 18th St., #945
Denver, CO 80202

Craig M. Wilson
P.O. Box 100
Sacramento, CA 95812

Laura A. Schroeder
P.O. Box 12527
Portland, OR 97212

John W. Howard
JW Howard Attorneys, Ltd.
625 Broadway, #1206
San Diego, CA 92101

Wesley G. Beverlin
Malissa N. McKeith
Lewis, Brisbois, Bisgaard & Smith, LCP
221 N. Figueroa St., #1200
Los Angeles, NC 90012

William E. Schaeffer
P.O. Box 936
Battle Mountain, NV 89820

Tom Glidden
U.S. Dept. of the Interior
Office of Sec./Div. of Indian Affairs
Mail Stop 6456
1849 C Street N.W.
Washington, D.C. 20240

Stephen B. Rye
Chief Deputy Districat Atty., Lyon County
31 S. Main St.
Yerington, NV 89447

Todd Plimpton
Belanger & Plimpton
1135 Central Ave.
P.O. Box 59
Lovelock, NV 89419

Dated this 22nd day of February, 2005.

Holly C. Dewar

WALKER RIVER IRRIGATION DISTRICT
BOARD OF DIRECTORS' SPECIAL MEETING
CASINO WEST CONVENTION CENTER
11 NORTH MAIN STREET, YERINGTON, NEVADA

December 15, 2004
Wednesday
10:00 A.M.

Note: Items on the agenda without a time designation may not necessarily be considered in the order in which they appear on the agenda.

OFFICIAL AGENDA

All items are action items unless otherwise noted.

1. Roll Call and Determination of Quorum

2. Public Forum (10:00 AM)
Any member of the public may address and ask questions of the Board relating to any matter within the Board's jurisdiction. Public comments need not be related to any item on the agenda. Action will not be taken on any matter raised by the public until the matter is specifically included on an agenda as an item upon which action will be taken.

3. Report from legal counsel concerning the Mediation involving the Walker River Issues and concerning the continuation of the Mediation.

4. Public testimony and action on whether the District Manager and legal counsel should be authorized and directed to prepare and submit a proposal to the Bureau of Reclamation under the provisions Section 207(b) of Public Law 108-7 for funding of a voluntary pilot program pursuant to which District Farmers could voluntarily provide a portion of stored water allocated in 2005 to provide water to Walker Lake. The elements of the voluntary pilot program will be presented to the Board and the public at the meeting.

5. Public testimony and action on whether the District should continue to participate in the Mediation Process and, if so, whether the District should support a continuation of the stay of pending litigation.

6. Adjourn.

We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If special arrangements for the meeting are necessary, please contact Tricia Irvine at (775) 463-3523 at least 24 hours in advance.

EXHIBIT A